(4)

No. 96-1569

In The

Supreme Court of the United States

October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,

Petitioners,

vs.

JANET SCOTT-HARRIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U.S.C. § 1983 for actions taken in a legislative capacity?

Whether the First Circuit Court of Appeals erred in affirming the denial of the Individual Defendants' Motions for Judgment Notwithstanding the Verdict on the grounds that, in conflict with this Court and the majority of other circuit courts, it determined that absolute legislative immunity was unavailable to municipal officials as a defense to an action pursuant to 42 U.S.C. § 1983, because of their improper motives and even though the municipal officials' challenged actions are quintessentially legislative, *i.e.*, the enactment of a local government budget?

Whether the First Circuit Court of Appeals erred in holding that the individual municipal officials proximately caused the plaintiff injury pursuant to 42 U.S.C. § 1983, even though the official municipal decisionmaker lawfully enacted a valid municipal budgetary ordinance?

LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioners, Daniel E. Bogan and Marilyn Roderick, provide the following list of parties as required by Supreme Court Rule 24(b):

1. Petitioner Daniel E. Bogan was a defendant in the proceedings in the United States District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.

2. Petitioner Marilyn Roderick was a defendant in the proceedings in the United States District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit.

3. The City of Fall River, Massachusetts, a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts, was a defendant in the proceedings in the United States District Court for the District of Massachusetts and an appellant before the United States Court of Appeals for the First Circuit. The City is not a petitioner.

4. Respondent Janet Scott-Harris was the plaintiff in the proceedings in the United States District Court for the District of Massachusetts and the appellee before the United States Court of Appeals for the First Circuit.

5. A number of other defendants in the proceedings in the United States District Court for the District of Massachusetts, were dismissed or granted a directed verdict at various points prior to the appeal.

LISTING OF ALL THE PARTIES – Continued

6. Counsel:

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   b. Bruce Assad; Fall River, Massachusetts

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OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the District of Massachusetts, Hon. Patricia Saris, presiding is unreported, but a copy of the order denying the Defendants' Motions for Judgment Notwithstanding the Verdict is printed in the Appendix to the Petition for Certiorari (hereinafter "*Petition Appendix*" or "*Pet. App.*") at *Pet. App.* 1-33. The opinion of the Court of Appeals for the First Circuit is not yet reported, but a copy of the slip opinion is reproduced in the Petition Appendix at *Pet. App.* 36-74. The judgment of the district court and the First Circuit denial of rehearing are also reproduced in the Petition Appendix at *Pet. App.* 75 and 76-78, respectively.

JURISDICTION

The opinion of the Court of Appeals for the First Circuit issued on January 15, 1997. *Pet. App.* at 36. A timely petition for rehearing was denied February 24, 1997. *Id.* at 76. The First Circuit entered judgment on January 15, 1997, and its mandate was stayed on March 7, 1997. *Id.* at 34. This Court granted the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit on June 9, 1997. *Joint Appendix* (hereinafter "*J.A.*") at 287. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY OR STATUTORY PROVISIONS

Article I, Section 6 of the United States Constitution provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in

> either House, they shall not be questioned in any other Place.
>
> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1983 of Title 42, Chapter 21 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 55 of Chapter 43, of the Massachusetts General Laws provides:

> Every order, ordinance, resolution and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it he shall sign it; if he

> disapproves it he shall return it, with his written objections, to the city council, which shall enter the objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution or vote by a two thirds vote of all its members, it shall then be in force, but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution and vote shall be in force if not returned by the mayor within ten days after it has been presented to him. This section shall not apply to budgets submitted under section thirty-two of chapter forty-four or to appropriations by a city council under section thirty-three of said chapter.

Section 33 of Chapter 44, of the Massachusetts General Laws provides:

> In case of the failure of the mayor to transmit to the city council a written recommendation for an appropriation for any purpose not included in the annual budget, which is deemed necessary by the council, after having been so requested by vote thereof, said council, after the expiration of seven days from such vote, upon its own initiative may make such appropriation by a vote of at least two thirds of its members, and shall in all cases clearly specify the amount to be expended for each particular purpose, but no appropriation may be voted hereunder so as to fix specific salaries of employees under the direction of boards elected by the people, other than the city council.

STATEMENT OF THE CASE

I. THE GOVERNMENT OF THE CITY OF FALL RIVER.

Upon its incorporation, the City of Fall River (hereinafter "the City") adopted as its city charter, Plan A, pursuant to Massachusetts General Laws Chapter 43, §§ 2, 46 (1994). *See J.A.* at 82. Pursuant to the Massachusetts Constitution, the

City has the power to revise and amend its charter. *See* Mass. Const. amend. art. II, § 1, 6-7; *see also* Mass. Gen. L. Ann. ch. 43B, § 3 (1994).[1] In addition, as a Plan A form of government, the City is governed by a mayor and city council, which consists of nine councillors elected at large by and from the qualified voters of the City. *See* Mass. Gen. L. Ann. ch. 43, §§ 48, 50 (1994). Municipal ordinances legislating in a variety of areas may be passed upon proposal by the mayor and a favorable vote of the majority of the city councillors. *See id.* at § 55; *see also J.A.* at 85-87.

By state statute the City must enact an annual budget. *See* Mass. Gen. L. Ann. ch. 44, § 32 (1994) (reproduced in Appendix A). The mayor must submit to the city council an annual budget which contains his or her recommended expenditures, by specified classifications and designations, for the city for the upcoming fiscal year. *Id.* "The city council may by majority vote make appropriations for the purposes recommended and may reduce or reject any amount recommended in the annual budget." *Id.* at § 32(2). Further, the city council may add appropriations to the mayor's recommended budget which it deems necessary and which it approves by two-thirds of the council members. *See id.* at § 33. If the mayor fails to submit his or her recommended budget within the time specified by statute, the city council, on its own initiative, shall prepare the annual budget and vote on the amounts appropriated in that budget. *Id.* at § 32.

II. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

In 1987, the Mayor and majority of the City Council enacted an ordinance establishing the Department of Health and Human Services ("DHHS") for the City. *See J.A.* at 100.

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[1] The Home Rule Amendment and the Home Rule Procedures Act permit municipalities to exercise any power or function conferrable by the legislature so long as the exercise is not inconsistent with the Constitution and General Laws. *See Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 10, 329 N.E.2d 748, 754 (1975).

DHHS was established to oversee four pre-existing City divisions: the Public Health Department, the Council on Aging, the Department of Veterans Affairs, and the Buildings and Code Enforcement Department. *Id.* These divisions, through their division heads, reported to the Administrator of DHHS, who in turn reported to the City Administrator. Pursuant the City's Charter, DHHS could be dismantled only by enactment of an ordinance. *See id.* at 88.

After the creation of DHHS by ordinance, Janet Scott-Harris, an African-American woman, was selected as the Administrator of DHHS in 1987, at an annual salary of $48,600. *See Pet. App.* at 2. The position did not have civil service or contract protection. *Id.* During the course of her employment as Administrator of DHHS, Scott-Harris performed well, but experienced ongoing conflict with and hostility from another City employee, Ms. Dorothy Biltcliffe. *See id.* at 2, 4-6. Biltcliffe was employed at the Council on Aging and Scott-Harris had heard Biltcliffe use racially charged and inappropriate language. *Id.* at 4-5. After consulting with Mr. Robert L. Connors, the City Administrator, Scott-Harris filed a complaint against Biltcliffe based on this conduct. *Id.* Biltcliffe threatened to use her "influence" in response to the charges. *Id.* She contacted several people, including Ms. Marilyn Roderick, a City Councillor and Chairperson of the City's Ordinance Committee. *Id.*

A hearing on the charges was scheduled. On the day of the hearing, a settlement was accepted by the attorney present on behalf of Scott-Harris, whereby Biltcliffe was suspended without pay for sixty days. Biltcliffe's suspension was later reduced by Mr. Daniel E. Bogan after he became acting Mayor of the City.[2]

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[2] Due to an inadvertent error by the City, Biltcliffe's position, a civil service position to which Biltcliffe had a right to by law, was filled by another employee while Biltcliffe was on leave of absence. In the 1992 Budget, the City attempted to correct this error by funding another administrative position for the other employee. Upon her return from leave, Biltcliffe was returned to her previous position to which she was entitled

III. THE 1992 BUDGET.

In December 1990, the Mayor of Fall River resigned to accept another position. *Pet. App.* at 6. Bogan, as President of the City Council, became acting Mayor of the City on December 21, 1990. *Id.* In January 1991, in preparation for the 1992 Fiscal Year Budget, Mayor Bogan and Connors requested the various City Departments to submit budget proposals which included a 10% decrease in expenses from the previous fiscal year due to the anticipated decline in state aid to the City for 1992. *Id.* at 6-7. Scott-Harris submitted a budget for DHHS with a proposal to reduce that Department's budget through the elimination of vacant positions and reducing nursing services in schools and senior centers. *Id.* at 7.

After receiving the budget proposals, Connors presented Mayor Bogan with options for reducing the 1992 budget: (1) reduce expenses; (2) reduce capital outlays; and/or (3) reduce personnel. *See* Tr. Trans. at 5:44. Additionally, Connors provided Mayor Bogan with a list of vacant positions. *See id.*; *Pet. App.* at 7. In response, Mayor Bogan requested a list of all temporary positions, provisional positions, positions not under contract, positions not protected by Civil Service, and positions which had no impact on "front line" service. *See* Tr. Trans. at 5:45. Connors provided Mayor Bogan with the list, which included Scott-Harris' position as Administrator of DHHS. *Id.*

In conjunction with other cost saving measures, Mayor Bogan proposed the elimination of DHHS to reduce expenses for fiscal year 1992. *Pet. App.* at 7. Because the City created DHHS by ordinance, it could only be eliminated by ordinance. *J.A.* at 88. Mayor Bogan presented his proposed budget cuts to the City Council, including an ordinance eliminating DHHS (hereinafter "the Ordinance"). The Ordinance Committee of the City Council, chaired by Councillor Roderick, reported out the Ordinance and recommended its passage. *Pet.*

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under applicable civil service laws. *See* Testimony of Robert L. Connors, Trial Transcript (hereinafter "Tr. Trans.") at 5:29-30.

App. at 7-8. Shortly thereafter, a majority of the City Council approved the Ordinance in a six-to-two vote, with Councillor Roderick voting with the majority. *Id.*

The only reason stated during the City Council discussion of the Ordinance was the projected shortage of money – no one discussed the Biltcliffe affair or dissatisfaction with Scott-Harris' performance. *See id.* at 8. Mayor Bogan then signed the Ordinance into law, eliminating DHHS and therefore eliminating Scott-Harris' position. *Id.* The Ordinance became effective March 29, 1991.[3] Prior to the passage of the Ordinance, Mayor Bogan and Connors offered Scott-Harris another City position, which she rejected shortly before the Ordinance was passed. *Id.* at 9-10.

A total of 135 City positions were unfunded or eliminated in the 1992 Budget resulting in the actual termination of twenty-seven City employees. *Id.* at 8; *see also* Trial Exhibits 40 and 40A. In addition, Mayor Bogan froze all City employee salaries for 1992. While the Administrator of DHHS was the only administrator whose position was eliminated on the City employee roster (by virtue of the elimination of DHHS), at least five administrative positions were eliminated in the City's school budget. *See* Trial Exhibit 44.

IV. THE DISTRICT COURT DECISION.

Scott-Harris filed suit in the United States District Court for the District of Massachusetts, against the City of Fall River, Mayor Bogan, Councillor Roderick, and other City Councillors and officials, in their individual and official capacities, alleging in relevant part that, by passage of the Ordinance, they had (1) discriminated against her in violation of 42 U.S.C. § 1983 based upon her race; and (2) discriminated against her in violation of 42 U.S.C. § 1983 based upon

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[3] Had the Ordinance not been enacted prior to the submission of the annual budget to the city council, Mayor Bogan, by state statute, would have been required to recommend the appropriation of funds for DHHS for fiscal year 1992. *See* Mass. Gen. L. ch 44, § 32.

speech protected by the First Amendment.[4] *See J.A.* at 47-56. The district court asserted federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3). The district court denied Bogan's and Roderick's motions to dismiss as to each of them on the grounds of absolute legislative immunity as untimely, reserving the issue until after trial. *Id.* at 71-72, 73-74.

The district court commenced a nine day jury trial on May 16, 1994. *Id.* at 18. After the completion of the Defendants' case, the district court and the parties conducted an extensive jury charge conference.[5] The result of that conference was a special verdict form which was explained to the jury in detail by the district court. *Id.* at 137-140; 190-226. The form required the jury to address the liability of the three Defendants in a particular order: first the liability of the City (defined as the Mayor and the majority of the City Council), then the personal liability of Mayor Bogan and Councillor Roderick (hereinafter "the Individual Defendants"). The form required, and the district court clearly instructed, that if the jurors were to find that the City was not liable, then they were to proceed no further with their deliberations. *See id.*[6] None

[4] The other Defendants included Connors and four councillors. *J.A.* at 49-50. The claims against the four councillors were dismissed by joint stipulation and the district court granted Connors' motion for a directed verdict. *Id.* at 66-70; 133-137.

[5] The jury charge conference was not transcribed or recorded, and therefore there is no transcript of the conference in the record.

[6] The special verdict form was effectively comprised of four sections: Questions 1 through 4 dealt with the City's liability; Questions 5 through 7, and Questions 8 through 10 dealt with Mayor Bogan's and Councillor Roderick's individual liability, respectively; and Questions 11 through 15 then dealt with damages. *J.A.* at 137-141. The form advised jurors that, unless they found that the City had terminated Scott-Harris because of her race (Question 2) or because she had engaged in constitutionally protected speech (Question 3), *and* found that the City had thereby proximately caused Scott-Harris injury (Question 4), they were not to address any question pertaining to either Individual Defendant. *See id.*

of the parties objected to the instructions on the record prior to the jury charge. *See id.*

In response to the special questions, the jury found that there was no racial discrimination, but that Scott-Harris had proven that her protected speech was a substantial or motivating factor in the City's decision to enact the Ordinance. *Id.* at 149-153. The jury, as required by the instructions and verdict form, then went on to find that the Individual Defendants proximately caused the elimination of Scott-Harris' position, and acted maliciously or with reckless indifference to her rights. *Id.*

Following the entry of the verdict, the City, Bogan and Roderick filed Motions for Judgment Notwithstanding the Verdict, which the district court denied. *Id.* at 157-162; *Pet. App.* at 1-33. Specifically, the district court rejected the Individual Defendants' argument that they were entitled to a verdict in their favor on the grounds of absolute legislative immunity. *Pet. App.* 17-20. Noting that the First Circuit warranted submitting the question of whether the challenged actions were legislative or administrative to the jury, the district court concluded that the Individual Defendants were not entitled to immunity because the jury had found that the proffered reason for the Ordinance was pretextual, and that a substantial or motivating factor in its enactment was Scott-Harris' protected speech. *Id.* 19-20. Further, the district court noted that the "facially neutral" ordinance had a particularized impact on Scott-Harris as the only employee in the DHHS Department whose position was eliminated by the Ordinance. *Id.* at 20. The combination of these findings by the jury implied that the Ordinance "passed by the city council was an individually-targeted administrative act, rather than a neutral elimination of a position which incidentally resulted in the termination of the plaintiff." *Id.*

V. THE FIRST CIRCUIT OPINION.

On January 15, 1997, the United States Court of Appeals for the First Circuit reversed the district court's denial of the City of Fall River's Motion for Judgment Notwithstanding the

Verdict, holding that "no reasonable jury could find against the City on the proof presented." *Pet. App.* at 63; *see also id.* at 34-35. With respect to the Individual Defendants, the court of appeals affirmed the denials of their Motions for Judgment Notwithstanding the Verdict on grounds of legislative immunity, causation and sufficiency of the evidence. *Id.* at 66, 69, 70-71; *see also id.* at 34-35.

The First Circuit, after resolving issues related to the notice of appeal and the jury verdict form, addressed the liability of the municipality for passing a facially benign ordinance for allegedly unconstitutional reasons in violation of Scott-Harris' First Amendment rights. *Id.* at 53-63. Noting the competing views on the quantum of proof necessary for a plaintiff to prevail under such circumstances, the court assumed that "in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed . . . [but] any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others." *Id.* at 59. The court found it unnecessary to explicate further on the level of proof necessary, holding that "Scott-Harris has not only failed to prove that a majority of the councillors possessed a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding of that, more likely than not, a discriminatory animus propelled the City Council's action." *Id.* at 59-60. The court further noted that Scott-Harris produced no evidence as to seven out of the eight councillors who cast votes on the Ordinance and there was nothing to suggest that the City had deviated from the normal protocol for receiving and enacting ordinances. *Id.* at 60-61.

The First Circuit then turned to the individual liability of Bogan and Roderick. *Id.* at 63-71. Although the unchallenged jury instructions indicated that if there were no liability against the City there could be no liability against either Bogan or Roderick, the court went on to address the individual municipal officials' liability and affirmed the district

court's denial of their Motions for Judgment Notwithstanding the Verdict. *Id.* The court reasoned that the district court properly left the determination of absolute immunity to the jury and that, based on the jury's findings regarding the motivating factors for the enactment of the Ordinance, the denial of absolute immunity was proper. *Id.* at 65-66. Further, the court held that there was sufficient evidence that the individuals were the proximate cause of the enactment of the lawful Ordinance which resulted in the elimination of DHHS. *Id.* at 67-69. Finally, the court held that there was sufficient evidence to find that Scott-Harris' protected speech was a substantial or motivating factor behind the individuals' actions. *Id.* at 70-71.

SUMMARY OF ARGUMENT

I. Absolute immunity for legislators at all levels of government performing legislative functions is well-grounded in history and in reason. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The need to protect the democratic decisionmaking process, the danger of time and energy distraction, as well as the deterrence of qualified individuals from public service, are all reasons which militate in favor of immunity for legislators. *See, e.g., Supreme Ct. of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 731-732 (1980); *Tenney*, 341 U.S. at 373, 377. In addition, liability of the government entity, criminal liability for willful deprivations of constitutional rights, and the electoral process, all provide essential checks (or remedies) against unlawful government conduct. *See Lake Country Estates*, 440 U.S. at 405 n.29; *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Tenney*, 341 U.S. at 378.

Without exception, all post-*Lake Country Estates* cases that have considered this issue have held that municipal legislators are entitled to the same absolute immunity as their federal, state and regional counterparts. Moreover, this Court has clearly indicated its approval of this approach, despite having never directly addressed this precise question. *See*

Lake Country Estates, 440 U.S. at 404 n.26; *id.* at 407 (Marshall, J., dissenting); *Owen v. City of Independence*, 445 U.S. 622, 625-630 (1980); *Spallone v. United States*, 493 U.S. 265, 267 (1990).

As recognized by the post-*Lake Country Estates* decisions, the policies and reasoning which undergird absolute immunity for federal, state and regional legislators apply equally at the local level. There is nothing, either at common law or in the legislative history of 42 U.S.C. § 1983, to suggest that municipal legislators were viewed as *sui generis* and, therefore, not entitled to absolute legislative immunity. *See, e.g., Jones v. Loving*, 55 Miss. 109, 111, 30 Am. Rep. 508 (1877); Congr. Globe, 42d Congr., 1st session; 1 J. Dillon, *Law of Municipal Corporations*, § 313, p. 326 (3d ed. 1881). Municipal legislators performing the same functions as their federal, state, and regional counterparts, therefore, should be entitled to absolute immunity when performing those functions. *See Supreme Ct. of Va.*, 446 U.S. at 721-722, 733-734; *Tenney*, 341 U.S. at 376; *see also Forrester v. White*, 484 U.S. 219, 224 (1988).

II. *Tenney* and its progeny explicitly disavow the motive-based approach to absolute immunity employed by the First Circuit Court of Appeals. *See Tenney*, 341 U.S. at 377; *see also Fletcher v. Peck*, 6 Cranch 87, 131, 10 U.S. 87 (1810). Contrary to that court's analysis, the focus of the absolute immunity inquiry is the *function* performed by the official, rather than the *motives* underlying their actions. *Forrester*, 484 U.S. at 224. Absolute immunity is intended to protect individuals from the cost, inconvenience, and distraction of a trial. *Supreme Ct. of Va.*, 446 U.S. at 731-732. The First Circuit's infusion of a subjective element into the absolute immunity analysis forces defendants to defend against factual allegations and await their resolution prior to being permitted to avail themselves of absolute immunity's protections. In doing so, the First Circuit's formulation of the absolute immunity standard provides *less* protection to officials than qualified immunity under the post-*Harlow v. Fitzgerald* standard. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814-816 (1981).

Under the proper standard for absolute immunity, both Bogan and Roderick are entitled to absolute immunity because they were performing traditionally legislative functions, *i.e.*, the enactment of a budgetary ordinance, regardless of any allegedly improper motive. *See Lake Country Estates*, 440 U.S. at 406; *Tenney*, 371 U.S. at 377. Budgetmaking, including the elimination of municipal positions, signifies the formulation of prospective, legislative-type policy indicative of traditionally legislative functions. *See Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill. 1986), *aff'd*, 852 F.2d 946 (7th Cir. 1988); *see also Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908). This principle is true regardless of the scope of the impact of the legislation at issue because the function performed, *i.e.*, the ordering of priorities in light of limited financial resources, controls the determination whether local officials are performing legislative functions entitling them to absolute immunity. *See Acierno v. Cloutier*, 40 F.3d 597, 613 (3d Cir. 1994); *see also Forrester*, 484 U.S. at 224.

III. Where, as here, a city (or other government entity), enacts facially benign legislation for lawful reasons, the individuals who participate in the enactment of that legislation cannot, as a matter of law, proximately cause any actionable injury to those who may be adversely affected by the legislation. Only where the action challenged by the plaintiff was improper and where the individual officials played a significant role in orchestrating the improper action, may individual legislators be deemed the proximate cause of injury flowing from the enactment of legislation. To permit individual legislators to be held liable without such proof would permit anyone adversely affected by otherwise lawful legislation to target one or two individuals in the process and, merely by assigning some improper motive on the part of these individuals, recover for an "injury" which is the lawful effect of lawful legislation. *Cf. Douglas v. City of Jeanette, et al.*, 319 U.S. 157, 165 (1942).

ARGUMENT

I. LOCAL OFFICIALS ARE ENTITLED TO ABSOLUTE IMMUNITY FOR ACTIONS TAKEN IN THEIR LEGISLATIVE CAPACITIES.

A. Absolute Legislative Immunity Is Well-Established.

1. Absolute legislative immunity is well-grounded in history and reason.

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized that Congress did not intend § 1983 to abrogate immunities "well grounded in history and reason." "The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403 (1979); *accord Spallone v. United States*, 493 U.S. 265, 279 (1990); *Supreme Ct. of Va. v. Consumers Union, Inc.*, 446 U.S. 719, 732 (1980); *Tenney*, 341 U.S. at 372-375. "The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege," including the Massachusetts Constitution of 1780. *Tenney*, 341 U.S. at 373.

In what this Court has described as "perhaps the earliest American case to consider the import of the legislative privilege," *Spallone*, 493 U.S. at 279, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized the central importance of the privilege, as well as its well-settled historical roots. *Coffin v. Coffin*, 4 Mass. 1, 27, 3 Am. Dec. 189 (1808). By the time of *Tenney*, 41 of 48 states had specific provisions in their Constitutions protecting the privilege of legislators to

be free from arrest or civil process for actions taken in their legislative capacity.[7]

A legislator's absolute immunity from suit is equally well-grounded in reason. As stated by Justice Frankfurter writing for the majority in *Tenney*:

> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38.

Tenney, 341 U.S. at 373.

The same fundamental principle – that the immunity is essential for the public good – had been recognized some 150 years before *Tenney* by the Massachusetts Supreme Judicial Court in *Coffin v. Coffin*. In granting the rights of freedom of speech and debate to state legislatures, the court recognized that

> [t]hese privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine this to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the

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[7] Since then, two other states have adopted such provisions. *See* Alaska Const., art. II § 6; Hawaii Const., art. III § 7.

> making of a written report, and to every other act resulting from the nature, and any execution, of the office . . . .

Coffin, 4 Mass. at 27 (Parsons, C.J.). The privilege is both an individual privilege and a public right. *Id.*

Citing *Coffin* with approval in *Spallone v. United States*, 492 U.S. 265 (1989), Chief Justice Rehnquist, writing for the majority, noted that this theme "underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Id.* at 279 (citations omitted). Specifically addressing the appropriateness of a contempt sanction imposed on local legislators, the Court expressed its concern that "[t]he imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interests of their constituents or of the city, but with a view solely to their own personal interests." *Id.*; *see also, e.g., Supreme Ct. of Va.*, 446 U.S. at 731-732; *Lake Country Estates*, 440 U.S. at 404-405; *Powell v. McCormack*, 395 U.S. 486, 503 (1968). *Cf. Forrester v. White*, 484 U.S. 219, 223 (1988) (by its nature, threat of liability can create perverse incentives that inhibit officials in the proper performance of their duties).

The need to protect against distortion in the democratic decisionmaking process is, then, a long and widely recognized reason for cloaking legislators with absolute immunity. The problem of "time and energy distraction" is a second, critically important consideration militating in favor of immunity. *See Tenney*, 341 U.S. at 377 (absolute immunity for legislators avoids the danger they will "be subjected to the cost and inconvenience and distractions of a trial"); *Supreme Ct. of Va.*, 446 U.S. at 731-732 ("To preserve legislative independence, we have concluded that legislators engaged in the sphere of legitimate legislative activity, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." (internal citations and quotations omitted)); *see also Clinton v. Jones*,

117 S. Ct. 1636, 1657 (1997) (Breyer, J., concurring) (discussing the importance of this factor, as well as the risk of "official decision distortion," with respect to the applicability of immunity principles generally and observing that "[t]he cases ultimately turn on an assessment of the threat that a civil damage lawsuit poses to a public official's ability to perform his job properly.").

A third factor may be summarized as deterrence: able individuals will be deterred from serving as legislators if doing so exposes them to potentially staggering personal liability. *See Harlow v. Fitzgerald*, 457 U.S. 800, 827 (1982) (Burger, J., dissenting) (noting the number of frivolous lawsuits filed against public officials and the defending party's liability for costs and damages associated with the defense of these cases, which may discourage able individuals from running for office); *see also New Hampshire v. Rollins*, 129 N.H. 684, 686, 533 A.2d 331, 332 (1987) (Souter, J.) (discussing the principles behind prosecutorial immunity and observing that without such immunity, "it would be unreasonable to expect anyone to assume the risks that would follow from prosecuting for the public benefit.")

It has also been recognized as important that absolute legislative immunity does not eliminate essential checks on (or remedies against) unlawful governmental conduct. Plaintiffs almost invariably have a direct cause of action against the governmental entity within which the individual legislators serve. *See Lake Country Estates*, 440 U.S. at 405 n.29 (citing *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 663 (1978)); *Aitchison v. Raffiani*, 708 F.2d 943, 953 (3d Cir. 1983).[8] Moreover, willful deprivations

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[8] While this is true at the municipal and regional level, *see infra*, Part I(C)(3), the extent to which a plaintiff may recover against the governmental entity at the state level is necessarily narrower. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67, 71 (1989) (relying on Eleventh Amendment and concluding that § 1983 suits against state governments cannot be brought in state court); *Quern v. Jordan*, 440 U.S. 332 (1979) (Eleventh Amendment bars § 1983 suits against state governments in federal courts). State officials may, however, be sued in their official capacity for injunctive relief. *See Will*, 491 U.S. at 71 n.10.

of constitutional rights under color of state law remain punishable under 18 U.S.C. § 242, the criminal analog of § 1983. *Imbler*, 424 U.S. at 429; *see United States v. Gillock*, 445 U.S. 360, 372 (1980) (official immunity cases have drawn the line at civil actions) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). Finally, legislators are generally elected officials "subject to the responsibility and the brake of the electoral process." *Lake Country Estates*, 440 U.S. at 409 (Blackmun, J., dissenting). As observed by the Court in *Tenney*, "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." 341 U.S. at 378 (internal citations omitted); *see also, e.g., Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988) ("[o]ne recourse in dealing with legislators who hide behind their shield of immunity and vote 'improperly' is, of course, a resort to the ballot box,"); *Dusanenko v. Maloney*, 560 F. Supp. 822, 827 (S.D.N.Y. 1983), *aff'd*, 726 F.2d 82 (2d Cir. 1984).

In short, absolute legislative immunity has deep historical roots. The policy behind legislative immunity is the public good that derives from allowing public officials to perform legislative functions without fear of personal liability. Moreover, absolute legislative immunity promotes this "public good" while maintaining essential checks on, and remedies against, unlawful governmental conduct.

2. This Court has recognized absolute immunity for legislators at every level of government for which the question has been considered.

Consistent with these fundamental principles, this Court has recognized that legislators are entitled to absolute immunity at every level of government for which the question has been presented to the Court for consideration. *See Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1880) (federal level); *Powell*, 395 U.S. at 502-506 (same); *Tenney*, 341 U.S. at 379 (state level); *Supreme Ct. of Va.*, 446 U.S. at 733-734 (same); *Lake Country Estates*, 440 U.S. at 406 (regional level). In

determining that legislators at all levels of government are entitled to absolute immunity, the Court applies a "functional approach," which looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester*, 484 U.S. at 222; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Burns v. Reed*, 500 U.S. 478, 486 (1991) (also noting that the official seeking absolute immunity bears the burden of showing immunity is justified for the function in question).

In *Tenney*, the Court first considered whether the passage of § 1983, which by its plain language applied to "every person," had abrogated the privilege accorded to state legislatures at common law. 341 U.S. at 376. *Tenney* held squarely that it did not. *Id.* Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.* at 372, 376.

Applying the functional analysis, in *Lake Country Estates* the Court held that regional legislators are entitled to the same form of absolute immunity. 440 U.S. at 406. Specifically, Justice Stevens, writing for the majority, stated that "to the extent that . . . these individuals were *acting in a capacity comparable to that of members of the state legislature*, they are entitled to absolute immunity from federal damages liability." *Id.* (emphasis supplied). Given the similarity of function, the Court concluded that the reasoning behind the provision of absolute immunity "is equally applicable to federal, state, and regional legislatures." *Id.* at 405.

As the Court in *Lake Country Estates* noted, its holding was fully consistent with the functional analysis previously applied in *Butz v. Economou*, 438 U.S. 478 (1978), which recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture. *Id.* at 405 n.30. In *Butz*, the Court rejected the argument that absolute immunity should be denied because

the individuals were employed in the Executive Branch, reasoning that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz*, 438 U.S. at 511. As the Court noted in *Lake Country Estates*, "[t]his reasoning also applies to legislators." 440 U.S. at 405 n.30.

Precisely the same approach was followed in *Supreme Ct. of Va.*, where the Court rejected arguments compartmentalizing officials based only on their positions in a particular branch of government. 446 U.S. at 733-734. In *Supreme Ct. of Va.*, the plaintiffs challenged provisions of the Virginia bar code which had been promulgated by the Virginia Supreme Court pursuant to rulemaking authority delegated to the court by the Virginia legislature, and sought to hold the individual members of the court personally liable for their attorneys' fees. *Id.* at 721-722. The Court recognized that if the state legislators had enacted the bar code and suit had been brought against them, the state legislators would have been entitled to absolute immunity. *Id.* at 733-734. The Court reasoned that the state court judges were entitled to the same absolute immunity because they had effectively functioned as members of the state legislature in issuing the bar code. *Id.* at 734.

In sum, the principle of absolute immunity for legislators and those functioning as legislators is well-grounded in history and reason. Recognizing this and following a functional approach, this Court has applied it to every level of government for which the question has been presented for review.

B. All Post-*Lake Country Estates* Caselaw Has Held Municipal Legislators Absolutely Immune From Suit For Actions Taken In Their Legislative Capacity.

All United States Circuit Courts of Appeals have considered the question following *Lake Country Estates* and all have held that municipal legislators are entitled to the same absolute immunity as their federal, state and regional counterparts. In a striking measure of unanimity, all the circuit courts' decisions have been the product of a unanimous panel. *See*,

e.g., *Fry v. Board of County Comm'rs*, 7 F.3d 936, 942 (10th Cir. 1993); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22-23 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992) (*dicta*); *Gross v. Winter*, 876 F.2d 165, 169 (D.C. Cir. 1989); *Haskell v. Washington Township*, 864 F.2d 1266, 1277 (6th Cir. 1988), *appeal after remand*, 891 F.2d 132 (6th Cir. 1989); *Aitchison*, 708 F.2d at 98-99; *Reed v. Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez v. Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982), *appeal after remand*, 699 F.2d 734 (5th Cir. 1983); *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980).[9]

This Court, while never called upon to decide the precise question, has also given clear indications that it too believes this is the correct result. The difficulty of reaching a *contrary* result was enunciated by Justice Marshall in his dissenting opinion in *Lake Country Estates*, 440 U.S. at 407 (Marshall, J., dissenting). As observed by Justice Marshall:

> [T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely, the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the "uninhibited discharge of their legislative duty," *ante*, at 405, quoting *Tenney v. Brandhove*, *supra* at 377, applies with equal force whether the officials occupy local or regional positions.

Id. at 407-408 (Marshall, J., dissenting).

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[9] In fact, courts faced with nearly identical situations, *i.e.*, the elimination of a position in the context of the municipalities formulation of its budget policies, have concluded that the local officials were performing traditional legislative functions entitling them to absolute immunity from suit. *See infra*, Part II(B)(1).

In *Owen v. City of Independence*, 445 U.S. 622, 625-630 (1980), the plaintiff had been discharged by the City of Independence from his position as chief of police and brought suit against the city under § 1983. The Court ruled that the municipality itself did not enjoy immunity from suit. *Id.* at 638. In dissenting from this ruling, Justice Powell, joined by three other justices, stated flatly that, as to an individual councilperson, Paul Roberts, who was a particular antagonist of the plaintiff: "Roberts himself enjoyed absolute immunity from Section 1983 suits for acts taken in his legislative capacity." *Id.* at 664 n.6 (Powell, J., dissenting) (citing *Lake Country Estates*, 440 U.S. at 402-406).

Most recently, in *Spallone v. United States*, 493 U.S. 265, 267 (1990), the Court ruled that the district court had abused its discretion by holding four Yonkers city council members in contempt for refusing to vote in favor of legislation implementing a consent decree earlier approved by the city. Writing for the majority, Chief Justice Rehnquist noted that state legislators had been held to enjoy an absolute privilege in *Tenney*, and that the same doctrine of legislative immunity had subsequently been applied to regional legislators in *Lake Country Estates* and to actions for both damages and injunctive relief in *Supreme Ct. of Va.*. *Id.* at 278-279. While noting that these cases did not control the question *sub judice*, *i.e.*, whether local legislators should be immune from contempt sanctions imposed for failure to vote in favor of a particular legislative bill, the Court observed that "some of the same considerations on which the immunity doctrine is based must inform the District Court's exercise of its discretion in a case such as this." *Id.* at 278. The Court then discussed the same principles which undergird the rule of absolute immunity for legislators at both the state and regional levels in its discussion of the contempt order against the municipal legislators, including the historical underpinnings of the absolute legislative privilege and the concern that "any restrictions on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Id.* at 279 (citing *Lake Country Estates*, 440 U.S. at 404-405; *Tenney*, 341 U.S. at 377.) At no time did

either the majority or minority opinions in *Spallone* suggest that those fundamental principles might be inapplicable, or entitled to any less weight, because the individual defendants were local, rather than state or federal, legislators.

C. The Same Principles Which Undergird Absolute Legislative Immunity At Other Levels Of Government Apply At The Municipal Level.

1. The historical basis for absolute legislative immunity has equal applicability to municipal legislators.

As noted, *supra*, the principle of absolute immunity for legislators goes back to 16th- and 17th-century England. It was consistently recognized in the common law and "was taken as a matter of course by our Nation's founders." *Lake Country Estates*, 440 U.S. at 403; *accord Tenney*, 341 U.S. at 372-375. The principle was never limited to particular levels of our government, whether federal, state, regional or municipal. To the contrary, our historical heritage is that the immunity applies to legislators and to those performing legislative functions generally.

Nor is there anything to suggest that, by the time Congress enacted § 1983 in 1871, municipal legislators had come to be viewed as *sui generis* and, therefore, not entitled to the same absolute immunity enjoyed by legislators at other levels of government. In a case decided the same decade that § 1983 was passed, *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508 (1877), the plaintiff attempted to sue town aldermen personally for their role in the passage of an ordinance which, he alleged, "unlawfully and maliciously deprived him of his legal rights, fees, privileges, and emoluments, and of his office of mayor. . . . " *Jones*, 55 Miss. at 111. The court sustained the defendants' demurrer, stating that "[i]t is impossible to perceive upon what theory such a suit can be maintained." *Id.* The court went on to discuss what it clearly perceived to be well-settled principles of law:

> If the ordinance was within the authority of the board, certainly the individual members of it cannot

> be made personally liable for a mistaken exercise of their powers; nor is it possible in such a case to inquire into the motives which prompted their action. . . . .
>
> It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.

Id. (internal citations omitted).[10]

Jones appears to state the widely held view at the time that local legislators were entitled to absolute immunity for their legislative acts. *See, e.g., Hill v. Board of Alderman*, 72 N.C. 63, 65 (1875); *County Comm'rs of Anne Arundel v. Duckett*, 20 Md. 468, 477, 479 (1863); *Wilson v. New York*, 1 Denio 595, 599 (N.Y. 1845).

Moreover, in 1881, the author of a comprehensive treatise on municipal law described the same principle of immunity from suit in a way which made it appear equally well-settled, observing that: "Where the *officers of a municipal corporation* are invested with legislative powers, they *are exempt from individual liability* for the passage of any ordinance within their authority, and their motives in reference

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[10] In addition, counsel for the defendants represented to the court in *Jones* that:

> No reported case can be found in which the members of the Legislature of a state, or even the officers of a municipal corporation, were sued for legislative acts, whether they were unconstitutional, oppressive, malicious, or corrupt. That judicial officers are not liable for errors of judgment is a proposition too well settled to be argued here.

Id. at 110 (internal citations omitted).

thereto will not be inquired into; nor are they individually liable for the passage of any ordinance not authorized by their powers; for such ordinance is void and need not be obeyed." 1 J. Dillon, *Law of Municipal Corporations*, § 313 pp. 326-327 (3d ed. 1881) (emphasis in original); *see also* T. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, 376, 377 (1880); J. Bishop, *Commentaries on the Non-Contract Law*, § 744 (1889); F. Mechem, *A Treatise on the Law of Public Offices and Officers*, § 646 (1890).

The holding that "§ 1983 'does not create civil liability' for acts unknown 'in a field where legislators traditionally have power to act,' " *Supreme Ct. of Va.*, 446 U.S. at 732-733 (quoting *Tenney*, 341 U.S. at 379), thus has fully as much applicability to municipal legislators as to their counterparts in other levels of government. There is no historical support for a view that they were ever considered *sui generis*, and this Court's review of the historical underpinnings for the rule of absolute legislative immunity have never been narrowly limited to a single form of legislative body. There is also nothing in the legislative history to § 1983 to suggest that Congress intended that a different approach should apply to legislators at the municipal level. *See generally* Congr. Globe, 42d Congr., 1st Session. For all of these reasons, the historical basis for absolute legislative immunity has equal applicability to municipal legislators.

2. Municipal legislators perform the same functions as their counterparts in other levels of government and absolute immunity for them is equally well-grounded in reason.

As noted above, whether a particular official is entitled to absolute immunity derives not from his or her title or position, but rather from the functions with which the official has been lawfully entrusted, and the effect which exposure to particular forms of liability would have on the appropriate exercise of those functions. *Buckley*, 509 U.S. at 268-269; *Forrester*, 484 U.S. at 224; *Butz*, 438 U.S. at 511; *Lake Country Estates*, 390 U.S. at 405. Municipal legislators perform the same kinds of functions as legislators at other levels

of government, and their need for absolute immunity is equally well-grounded in reason. *See generally, supra*, Part I(A)(1).

Municipal legislators carry out the same kinds of functions as legislators at other levels of government for whom absolute immunity has been specifically recognized. Like the Individual Defendants in the instant case, many municipal legislators perform necessary legislative functions which have been expressly delegated to them by state constitutions and statutes. *See, e.g.*, Ariz. Const., art. XIII, §§ 2, 3; Cal. Const., art. XI, § 6 *et seq.*; Ga. Const., art. IX, § 2, ¶ 2; Kan. Const., art. 12, § 5; La. Const., art VI, § 5; Mass. Const., amend. art. II, §§ 1, 6, 7; N.H. Rev. Stat. Ann. § 40-A-1; N.J. Rev. Stat. § 40:42:1 *et seq*. To carry out these functions, local governments may adopt, amend or repeal local ordinances or by-laws. *See id.* These powers are necessarily limited and extend only so far as the state delegates its authority in a particular area. *See* Mass. Const., amend. art. II, § 6. For example, local legislative bodies enacting budgetary legislation often act pursuant to state statutes delegating to them certain legislative and policy making functions. *See, e.g.*, Mass Gen. Laws Ann. ch. 44, § 32; Conn. Gen. Stat. § 7-148. As such, local officials essentially function like members of the state legislature when performing these tasks. *See Ryan v. Burlington County*, 889, F.2d 1286, 1290 (3d Cir. 1989) ("It is only with respect to the legislative powers delegated to them by the state legislatures that the members of local governing boards are entitled to absolute immunity.")

Clearly, state legislators involved in the enactment of budgetary legislation would be entitled to absolute immunity for actions taken in that process. *See Tenney*, 341 U.S. at 376. Officials performing such functions should not be exposed to personal liability simply because they are performing them at the local level. *See Supreme Ct. of Va.*, 446 U.S. at 721-722, 733-734; *Butz*, 438 U.S. at 511-512; *Gravel v. United States*, 408 U.S. 606, 616-617, 618 (1972). *Cf. Barr v. Mateo*, 360 U.S. 564, 573 (1958) ("The complexities and magnitude of government activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become

less important simply because they are exercised by officers of lower rank in the executive hierarchy."); *Harlow*, 457 U.S. at 823 (Burger, J., dissenting) (noting that Court has adopted a functional approach to legislative immunity at the federal level, adopting "a functional analysis of the legislative process in the context of the Constitution taken as a whole and in light of 20th-century realities").

Absolute immunity for municipal legislators is also as well grounded in reason as it is for their counterparts at other levels of government. As is true at the federal, state, and regional level, the protections afforded by absolute immunity enhance the integrity of the legislative process at the local level. While the exact configuration of the governing entities is different, at all these levels, the legislative process is intended to encompass debate and compromise regarding the will of the people and the best means for effectuating that will. Legislators must be free to exercise their discretion and decisionmaking authority guided by what is best for their constituents and community, rather than by fear of personal liability. *See Lake Country Estates*, 440 U.S. at 404-405; *see also Spallone*, 493 U.S. at 279 ("[A]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process.").

The related concerns of "decision distortion" and "time and energy distraction" are just as compelling at the municipal level. Local officials live among their constituents and often interact with the electorate on a daily basis. The relationship is often personal and familiar. Indeed, given this proximity, the potential for vindictive litigation and the need to protect the freedom of these legislators to engage in the normal legislative process is, if anything, accentuated. *See Gorman Towers*, 626 F.2d at 612 (" 'because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation.' ") (quoting *Ligon v. Maryland*, 448 F. Supp. 935, 947 (D. Md. 1977)); *see also Dusanenko*, 560 F. Supp. at 826, 827. Moreover, unlike state and federal officials, many local officials are part-time public servants, giving their free time to govern locally. The

chilling effect of exposing these officials to liability for their legislative functions is therefore increased at the local level because the compensation for such service would be substantially outweighed by the potential for exposure to personal liability.

In short, local legislators are effectively responsible for the same functions as their federal, state and regional counterparts. The reasons which support immunity for legislators at those levels apply equally to legislators at the local level. They should, therefore, enjoy the same absolute immunity from suit.

3. The same checks apply to municipal legislators as to their counterparts at other levels of government.

The same checks on unconstitutional conduct also apply to municipal legislators as to their counterparts at other levels of government. As with state and federal legislators, local officials must stand for election. Constituents who are dissatisfied with the manner in which they exercise their authority may always resort to the ballot box. *See Tenney*, 341 U.S. at 378 (control by the voters is an important restraint on unconstitutional acts by state legislators); *Rateree*, 852 F.2d at 951; *Dusanenko*, 560 F. Supp. at 827. The existence of this check on the actions taken by local officials is persuasive evidence that they should be entitled to absolute immunity. *See Tenney*, 341 U.S. at 378; *Gorman Towers*, 626 F.2d at 613. In this respect, the justification for extending absolute immunity to local elected officials is considerably stronger than in *Lake Country Estates*, where the Court held that *appointed* members of a regional planning board were entitled to absolute immunity when performing legislative functions.

Additionally, individuals who believe their civil rights have been violated by the enactment of unconstitutional legislation may pursue remedies against the municipality itself. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) (no municipal

immunity); *Owen*, 445 U.S. at 638; *Monell*, 436 U.S. at 663.[11] Thus, unlike most plaintiffs alleging injury by state governmental actors, plaintiffs allegedly injured by the implementation or execution of municipal policy may sue the municipal entity itself, pursuant to § 1983, for monetary, declaratory and injunctive relief. *See Monell*, 436 U.S. at 663; *see also supra*, note 8. Willful deprivations of constitutional rights by municipal officials under color of state law also remain punishable under 18 U.S.C. § 242.

Further, the absence of any immunity for city government not only provides an effective remedy for wronged individuals; it also provides an additional check on unlawful behavior by municipal legislators. As noted by the Court in *Owen v. City of Independence*, "[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended action to err on the side of protecting citizens' constitutional rights." 445 U.S. at 651-652; *accord Spallone*, 493 U.S. at 280 (noting that the prospects of a "bankrupting fine" against the municipal entity would likely influence the actions of individual city councilpersons.).

In other settings, this Court has recognized the necessity of absolute immunity for individuals as to whom such checks may be lacking. *See, e.g., Imbler*, 424 U.S. at 417-419; *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). In these cases, the Court has concluded that it is " 'better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' " *Imbler*, 424 U.S. at 428 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)); *see also Burns*, 500 U.S. at 484. The availability of meaningful checks for municipal

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[11] If a party does not have an action against a municipal entity because the legislation that was the subject of the challenge was itself lawful, this also means that the party should have no cause of action against the individuals who passed the lawful legislation. *See infra*, Part III.

legislators makes their entitlement to absolute immunity still more compelling.

II. LOCAL LEGISLATIVE OFFICIALS ARE ENTITLED TO ABSOLUTE IMMUNITY WHEN THEY PROPOSE AND ENACT A LOCAL ORDINANCE RELATED TO THE LOCAL GOVERNMENTAL BUDGET REGARDLESS OF THEIR MOTIVATIONS.

Massachusetts General Laws Chapter 43, section 55, applicable to cities and towns adopting Plan A form of municipal government, outlines the procedure for the proper passage of ordinances. *See* Mass. Gen. L. Ann. ch. 43, § 55 (1994). It is undisputed that the Mayor and the City Council followed these procedures in adopting the position-elimination ordinance. *See J.A.* at 47-56. Likewise, it is undisputed that the Mayor and City Council followed the proper procedure for the proposal and adoption of the municipal budget as outlined in Chapter 44, section 32 of the Massachusetts General Laws. *See id.*; *see also* Mass. Gen. L. Ann. ch. 44, § 32 (1994). The only challenged actions by Mayor Bogan and Councillor Roderick are those undertaken as part of these two processes. *See J.A.* at 47-56; *Opposition to Petition for Certiorari* (hereinafter "*Opp.*") at 16 n.2. Thus, contrary to the decision of the First Circuit, this challenged conduct falls comfortably within the realm of traditionally legislative functions, entitling both individuals to absolute immunity, regardless of their motives.

A. The First Circuit Erroneously Considered The Individual Defendants' Motives.

Individual personal motivations are irrelevant to whether particular officials are performing legislative functions and therefore entitled to absolute immunity. *Tenney*, 341 U.S. at 377. Whether officials are entitled to the protections of absolute immunity is controlled by the function the official was performing at the time they took the challenged actions. *Forrester*, 484 U.S. at 224. Specifically in the legislative

context, this determination requires an assessment of whether the challenged actions are traditionally legislative functions (for which there is absolute immunity), or merely administrative functions (for which there may only be qualified immunity). *See Supreme Ct. of Va.*, 446 U.S. at 731; *Tenney*, 341 U.S. at 376; *see also Forrester*, 484 U.S. at 224. Under this functional approach, an individual's personal motivations for taking the challenged action are outside the scope of the relevant inquiry. *Tenney*, 341 U.S. at 377.

Were there any doubt that this were true, this Court's decision in *Tenney* eliminated any possible ambiguity. *Id.* While noting that the immunity available to legislators is not limitless, this Court stated: "*[t]he claim of an unworthy purpose does not destroy the privilege. . . .* The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* (emphasis added). Moreover, the Court made clear that the judicial arena was not the proper forum to consider the motives of policy makers engaged in legitimate legislative activity. *Id.*; *see also United States v. Brewster*, 408 U.S. 501, 525 (1971). Justice Frankfurter, writing for the majority in *Tenney*, stated:

> *In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies.* Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.

Tenney, 341 U.S. at 378 (emphasis added); *see also Eastland v. United States Servicemens' Fund*, 421 U.S. 491, 508 (1975); *Fletcher v. Peck*, 6 Cranch 87, 131, 10 U.S. 87 (1810) ("If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual

against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature that passed the law.")[12]

Noting that the parties asserted different motivations for the proposed ordinance, *i.e.*, budgetary constraints vs. retaliation for the exercise of First Amendment rights, the First Circuit concluded that "conflicted evidence as to the *defendants' true motives* raised genuine issues of material fact" precluding a determination regarding the applicability of absolute immunity. *Pet. App.* at 65 (emphasis added). In addition, the First Circuit held that the Individual Defendants were properly denied absolute immunity, based on two findings by the jury: (1) the defendants' [all three defendants] stated reason for enacting the Ordinance was not their real reason; and (2) Scott-Harris' protected speech was a substantial or motivating factor in the actions by the Individual Defendants relating to the Ordinance. *See id.* at 66; *see also id.* at 70-71 (discussing sufficiency of the evidence against Roderick and Bogan, noting specifically their alleged motivation for proposing and enacting the Ordinance). The court also articulated the distinction between legislative and administrative functions in terms of the nature of the facts used to reach the decision as well as the particularity of the impact of the official action. *Id.* at 64-65. By elevating these factors to the forefront of its analysis, the court necessarily (and impermissibly) forced an inquiry into the motivations of the individual legislators. *See id.* at 64-65, 66.

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[12] As noted by Justice Frankfurter, no case has called into question the basic understanding "that it is not consonant with our scheme of government for a court to inquire into the motives of legislators," since that principle was first articulated nearly 200 years ago. *Tenney*, 341 U.S. at 377 (citing *Fletcher*, 6 Cranch at 130.) Circuit courts have also acknowledged the continued viability of this basic principle since *Tenney*. *See, e.g., Fry*, 7 F.3d at 942; *Brown v. Collins*, 937 F.2d 175, 174 (5th Cir. 1991); *Rateree*, 852 F.2d at 951; *Aitchison*, 708 F.2d at 98; *Bruce*, 631 F.2d at 280; *see also Drayton v. Mayor & Council of Rockville*, 699 F. Supp. 1155, 1156 (D. Md. 1988), *aff'd*, 885 F.2d 864 (4th Cir. 1989).

Thus, the court looked behind a facially neutral, position-elimination ordinance, enacted as part of the City's budgetary process, to conclude that the Individual Defendants' actions were functionally administrative, not legislative, grounded purely on their allegedly improper motivations. *See id.* In so doing, the First Circuit reformulated the functional immunity analysis by using the Individual Defendants' motivations as the controlling factor. This reformulation of the standard is clearly contrary to this Court's pronouncements regarding absolute immunity and undermines the precise purpose that immunity was intended to serve. *See Eastland*, 421 U.S. at 508-509; *Tenney*, 341 U.S. at 377. *Cf. Butz*, 438 U.S. at 520 (Rehnquist, J., concurring and dissenting) ("It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The 'immunity' disappears at the very moment when it is needed. The critical inquiry in determining whether an official is entitled to claim immunity is not whether someone has in fact been injured by his action; that is part of the plaintiff's case in chief.")

Additionally, because the First Circuit emphasized motive and there were factual disputes regarding the Individual Defendants' motivations, the court characterized Bogan's and Roderick's pretrial motions to dismiss the action on absolute legislative immunity grounds as "premature". *Pet. App.* at 65. In fact, however, absolute immunity is *intended* to be raised at the early stages of the litigation because its very purpose is to protect legislators "not only from the consequences of litigation's results, *but also from the burden of defending themselves*." *Supreme Ct. of Va.*, 446 U.S. at 731-732 (emphasis added); *accord Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Imbler*, 424 U.S. at 419 n.13 (absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) ("legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves" (internal quotations and citations omitted)); *see also Nixon v.*

Fitzgerald, 457 U.S. 731, 742 (1982) (denial of dismissal on the basis of absolute immunity is immediately appealable). By virtue of the fact that a plaintiff ordinarily pleads improper motive when alleging a civil rights action against individuals pursuant to § 1983, and it is generally considered inappropriate to resolve issues of motive at the summary judgment stage, every individual defendant would be forced to await the resolution of factual issues regarding their motivation prior to being entitled to absolute legislative immunity. Clearly, this is not what this Court intended absolute immunity to involve and, again, it eviscerates the precise protections absolute immunity was intended to provide. *See Supreme Ct. of Va.*, 446 U.S. at 731-732; *see also Mitchell*, 472 U.S. at 525.

The First Circuit's analysis is not only contrary to the longstanding standards of absolute immunity; it actually results in transforming the standard for absolute legislative immunity into the standard for *qualified* immunity *prior* to this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1981). In *Harlow*, this Court recognized the adverse consequences for officials faced with rebutting allegations of "bad faith" in order to avail themselves of an immunity defense. *Id.* at 814-816. Contrary to the original intent of qualified immunity, the pre-*Harlow* standard "proved incompatible with [the Court's] admonition that insubstantial claims should not proceed to trial." *Id.* at 815-816; *accord Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (stressing importance of resolving questions of immunity at earliest possible stage); *Siegert v. Gilley*, 500 U.S. 226, 232-233 (1991) (Rehnquist, J.) (same). By forcing defendants to await the resolution of factual disputes which necessarily arise in resolving subjective good faith issues, officials are distracted from their governmental duties and inhibited in their discretionary actions, and able individuals are deterred from public office. *See Harlow*, 457 U.S. at 815-816 In particular this Court acknowledged the existence of "special costs to 'subjective' inquiries of this kind." *Id.* at 816. Noting that discretionary judgments are influenced by the decisionmakers' experiences, values and emotions, the Court observed that these variables

> also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

Id. at 816-817. The Court concluded, therefore, that the standard for qualified immunity, if it was to have any meaning at all, necessarily required the elimination of the subjective good faith element. *Id.* at 817.

The costs identified in *Harlow* as associated with a subjective intent element in the immunity analysis are equally applicable to the legislative context. *See supra*, Part I. Legislators forced to await the resolution of factual issues will be distracted from the business before them and inhibited from freely exercising policy making decisions, and qualified individuals will be deterred from serving the public as legislators due to the costs associated with mounting a defense to possible suits. *See id.* The First Circuit's infusion of a subjective element into the absolute immunity analysis, therefore, creates the very problems that *Harlow* sought to avoid in the qualified immunity context. Thus, the net effect of the First Circuit's approach is a reordering of the levels of protection available from absolute and qualified immunity. According to the First Circuit, the *most* protective form of immunity encompasses elements which were found by this Court to undermine the protections afforded by a *less* expansive form of immunity. Surely if consideration of subjective intent in the context of qualified immunity undermines its intended protection and essential purposes, consideration of those same elements can do no less damage in eviscerating the protections afforded by absolute immunity.

Based on the foregoing, the First Circuit erred in affirming the district court's denial of the Individual Defendants' motions to dismiss on the grounds that they were entitled to absolute immunity. The court's reliance on the Individual Defendants' alleged personal motivations for the proposal and

enactment of the position-elimination ordinance for its conclusion that the individuals were performing administrative not legislative functions, contravenes the established legal standard for absolute immunity and undermines the precise protection that absolute immunity was intended to provide.

B. According To The Proper Standard Regarding Absolute Legislative Immunity, Both Bogan And Roderick Are Absolutely Immune For Their Actions Taken In The Process Of Enacting The Budgetary Ordinance.

1. Budgetmaking is a quintessentially legislative function.

In its broadest sense, "traditional legislative function" signifies the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies. *See Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908) ("Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."). Legislative policy making, or "line-drawing", necessarily involves the balancing of social needs and rights of particular groups. The end result of that balancing, *i.e.*, an ordinance, by-law or policy, reflects the ordering of priorities for the community as a whole. Budgetmaking is indicative of the kind of line-drawing associated with legislative policy-making. "Ordering budget priorities is a complex process subject to many pressures and resulting in many compromises. Budgets are written to the clangor of many axes grinding. . . . Each line item in a budget may affect the interests of a few people intensely, but a budget expresses general policy by balancing the competing claims of hundreds of thousands of line items." *Rateree v. Rockett*, 630 F. Supp. 763, 771 (N.D. Ill. 1986), *aff'd*, 852 F.2d 946 (7th Cir. 1988).

The position-elimination ordinance passed by the City was intimately related to the budgetary policy making of the City. Based on a balancing of the particular needs of the City and its constituents, the City, through its budgetmaking

power, assessed available alternatives for dealing with the potential substantial cut in state aid. As a result of this process, the City formulated a budget which eliminated a number of positions and froze all City employees' salaries. The municipal government was also restructured, returning the Public Health Department, the Council on Aging, the Department of Veterans' Affairs to independent department status, and reorganizing the Building and Code Enforcement Department under the City Administrator. As a part of this reorganization, DHHS was eliminated and, thereby, the position of Administrator of DHHS, filled by Scott-Harris, was eliminated.

There was nothing unique or unusual about this result. "Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. . . . [These employment decisions, however,] are not 'employment decisions' at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body." *Rateree*, 852 F.2d at 950; *accord Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995). Moreover, while other positions could have been eliminated, or other services and programs cut to achieve the same net savings for the City, that reality only demonstrates that there are a multitude of permutations of the order of priorities from which the City's policy makers could choose.[13] The existence of alternative policy formulations demonstrates, rather than undermines, the prospective, policy making nature of the actions.[14]

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[13] This is clearly illustrated in the present case, where each department head was required to submit a proposed set of budget cuts and Scott-Harris submitted proposals which included reducing the hours of nurses at schools and senior homes. Preferring not to cut front-line services, Mayor Bogan instead proposed, and a majority of the City Council accepted, the restructuring of DHHS and the elimination of the position of Administrator.

[14] At trial and on appeal, Scott-Harris made much of the fact that the City may not have saved any money as a result of the elimination of

In fact, the Third, Fourth, Seventh, and District of Columbia Circuits, as well as district courts from the Second, Ninth and Tenth circuits, have directly addressed the issue of the entitlement of municipal officials to absolute immunity in the context presented here, *i.e.*, the passage of position-elimination ordinances, and have concluded that the local officials were performing traditionally legislative functions entitling them to absolute immunity from suit. *See, e.g., Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (elimination of government position is legislative, but unilateral order to fire someone is not); *Alexander*, 66 F.3d at 65 (budgetary decisions which may necessarily impact on employment are generally legislative acts); *Roberson v. Mullins*, 29 F.3d 133, 135 (4th Cir. 1994) (termination of employee without eliminating position is unrelated to process of adopting prospective, legislative-type rules and therefore is not shielded by absolute immunity doctrine); *Gross*, 876 F.2d at 172 n.10 (personnel actions flowing from traditional legislative functions like budget decisions are the type of actions for which legislators enjoy absolute immunity); *Rateree*, 852 F.2d at 950 (budgetmaking is quintessentially legislative function and job loss as a result of budget process does not make act administrative); *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating

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DHHS. The First Circuit also noted this fact. *Pet. App.* at 70 n.18. The fact that the City may not have ended up actually saving money, however, does not vitiate the legislative character of the decision. *See Drayton*, 699 F. Supp. at 1157 (D. Md. 1988), *aff'd*, 885 F.2d 864 (4th Cir. 1989). Poor policy choices by any legislature are not for the Court to second guess. *See Eastland*, 421 U.S. at 509 ("The wisdom of congressional approach or methodology is not open to judicial veto.") To hold two individuals involved in the collaborative legislative process personally liable for what may turn out to be poor policy is a usurpation of the legislative process. Not every bill passed reaches the goals it set out to achieve wisely and effectively, but this cannot, in a government with separate branches exercising distinct powers, be the sole basis for holding these individuals personally liable. The proper forum for correcting potentially erroneous legislative policy is clearly the ballot box.

plaintiff's position, regardless of claim of any unworthy purpose); *Rabkin v. Dean*, 856 F. Supp. 543, 547 (N.D. Cal. 1994) (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts); *Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D. Md. 1994) (position elimination and therefore entitled to absolute immunity); *Orange v. County of Suffolk*, 830 F. Supp. 701, 705 (E.D.N.Y. 1993) (resolution aimed at broad policy goals of streamlining, reorganizing and rolling back costs of department through elimination of positions is legislative act entitling defendants to absolute immunity); *Drayton*, 699 F. Supp. at 1156 (job elimination through budgetary process is a legislative act entitled to absolute immunity regardless of alleged discriminatory motives); *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988) (decision to hire or fire generally considered administrative, the abolition of municipal positions constitutes a legislative act); *Ditch v. Board of County Comm'rs*, 650 F. Supp. 1245, 1250 (D. Kan. 1986) (elimination of a program or job title is a formulation of policy and therefore entitled to absolute immunity), *amended on other therefore entitled to absolute immunity), amended on other grounds*, 669 F. Supp. 1553 (D. Kan. 1987); *Dusanenko*, 560 F. Supp. at 827 (absolute immunity applied to decision by town officials to reduce salaries); *Goldberg v. Spring Valley*, 538 F. Supp. 646, 650 (S.D.N.Y. 1982) (individual trustees who approved mayor's action which resulted in elimination of plaintiff's position were entitled to absolute immunity); *see also Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995) (council decision to deny salary increases as part of enacting annual budget was a core legislative function), *cert. denied*, 116 S. Ct. 775 (1996); *Healey v. Pembroke*, 831 F.2d 989, 993 (11th Cir. 1987).

The implications of a contrary rule could result in potential fiscal mismanagement by many local governments as well as the usurpation of the legislators' faithful representation of the interests of their constituents. If action by local officials to eliminate positions in the context of formulating and enacting a municipal budget are not protected by absolute immunity, every time local legislators enacted position-elimination

ordinances for fiscally sound reasons, they would subject themselves to personal suit. Taken to its logical end, council members would be inhibited from exercising their budgetary policy making function and would be inhibited from eliminating positions even though it may be fiscally sound for the city to do so. It is clearly in the public interest to ensure that local government officials exercise freedom of judgment when enacting budgetary legislation, including position-elimination legislation.

2. The limited impact of the position-elimination ordinance is not the controlling factor.

In many cases, as in the present case, the legislation at issue impacts only a handful of individuals. *See, e.g., Rateree*, 852 F.2d at 950-951; *Aitchison*, 708 F.2d at 98; *Rabkin*, 856 F. Supp. at 547; *Ditch*, 650 F. Supp. at 1248; *Dusanenko*, 560 F. Supp. at 823, 827. The scope of the act's impact, however, is not the focus of the immunity inquiry; rather the *function* performed must be the focus. *See Forrester*, 484 U.S. at 224. To hinge absolute immunity on the breadth of the impact of the policy prohibits clear demarcation of where immunity's protections begin and end. Without such demarcation, officials will experience the pressure of threatened litigation just as greatly as if there were no absolute immunity at all. *See Acierno v. Cloutier*, 40 F.3d 597, 613 (3d Cir. 1994) ("a blind adherence to the principle that legislation affecting a single property or owner is administrative rather than legislative would eviscerate the overarching aim of protecting local legislators from suit under the absolute immunity doctrine when making broad policy decisions to further the communities in which they live."); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 579 (9th Cir. 1984) (same), *cert. denied*, 471 U.S. 1054 (1985).

This is particularly true with regard to the local budget-making process. "Budgetmaking is a quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources. When budgets are cut materially in an industry as labor intensive as that of

local government, some people will almost surely lose their jobs." *Rateree*, 630 F. Supp. at 771. Further, legislation by local governments necessarily may be limited in its impact by virtue of the size of the particular political subdivision. To permit the size of the particular municipality or county to dictate what is or is not legislative in function creates an arbitrary distinction unrelated to whether the function being performed is legislative in character. Thus, while providing local officials with the protective umbrella of absolute immunity, such a standard would, at the same time, deny them its use when it is most needed.

As the present case illustrates, it is also inherently misguided to focus on the impact of a specific ordinance in a vacuum. The reorganization of DHHS which resulted in the elimination of Scott-Harris' position was part of an overall budget process for the City. A total of 134 other positions were eliminated, resulting in the termination of twenty-seven other City employees. At least five administrative positions within the school department were also eliminated. To assert that the Ordinance which eliminated Scott-Harris' position was "administrative" because the Ordinance *itself* only focused on DHHS, creates an overly mechanistic and arbitrary distinction between administrative and legislative acts and, in so doing, blinks reality. *Cf. Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174 (5th Cir. 1991) (rejecting distinctions between general and particularized ordinances in zoning context, concluding that both enactment of zoning code and "spot zoning" are legislative functions because both entail legislative judgments), *cert. denied*, 502 U.S. 1060 (1992).

3. The challenged actions are actions traditionally associated with the legislative process.

Not only were the challenged actions undertaken in the course of substantively legislative functions, but the actions themselves were indicative of traditionally legislative, rather than administrative, action. In order to ensure that absolute

legislative immunity truly serves its intended purpose, "legislative function" must include within its protective ambit the entire progression of actions necessary to the enactment of legislation. *See Gravel*, 408 U.S. at 625; *Tenney*, 341 U.S. at 367; *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (legislative function includes power of inquiry because legislative body cannot legislate effectively in the absence of information); *Coffin*, 4 Mass. at 27. Anything less than absolute immunity, at any point in the progression, could inhibit the free exchange necessary to the democratic policy making process. *Cf. Buckley*, 509 U.S. at 273 (noting that protection less than absolute immunity even at the initial stages of the judicial process could affect a prosecutor's performance throughout the judicial process). As such, the protective net of absolute immunity includes researching and investigating for the purpose of formulating new policies, proposing legislation, considering legislation, and enacting legislation through debating, compromising, voting, vetoing or signing. *See, e.g., Brewster*, 408 U.S. at 512, 514, 516, 516 n.10 (collecting cases); *Kilbourn*, 103 U.S. at 204; *Coffin*, 4 Mass. at 27; *see also Calhoun*, 937 F.2d at 174; *Larsen v. Early*, 842 F. Supp. 1310, 1313-1314 (D. Colo.), *aff'd*, 34 F.3d 1076 (10th Cir. 1994).

Bogan's challenged actions, *i.e.*, the decision to propose the position-elimination ordinance as part of the budgetary process, the actual proposal of that ordinance, and signing the ordinance after passage by the city council, are typical legislative functions. *See, e.g., Calhoun*, 937 F.2d at 174 (individual defendant introduced zoning moratorium and entitled to absolute legislative immunity); *Aitchison*, 708 F.2d at 99 (mayor's vote established participation in the legislative process); *Larsen*, 842 F. Supp. at 1313-1314 (state senator entitled to absolute immunity for presentation of bill to fellow legislators; it was legislative function, regardless of fraud allegations).

> [T]he decision whether or not to introduce legislation is one of the most purely legislative acts that there is. . . . such decisions are an important part of the process by which legislators govern legislation . . . To conclude otherwise would require us to ignore the central purpose of the doctrine of legislative immunity. . . . When individuals can sue members of a legislative body to ensure that a certain piece of legislation is brought before that body for a vote, the process is no longer democratic.

Yeldell v. Cooper Green Hosp., Inc., et al, 956 F.2d 1056, 1063 (11th Cir. 1992). These principles are unchanged by Bogan's position in the executive branch of the local government. *See Forrester*, 484 U.S. at 224; *Supreme Ct. of Va.*, 446 U.S. at 734; *Butz*, 438 U.S. at 511, 512; *see also Aitchison*, 708 F.2d at 99.

Likewise, Bogan's challenged act of signing the ordinance into law was procedurally a traditionally legislative function. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (Constitution does not contemplate complete separation of powers evidenced by the fact that "[t]he President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress."); *Edwards v. United States*, 286 U.S. 482, 491 (1932) (President's signing into law of bill passed by Congress is a legislative act); *Smiley v. Holm*, 285 U.S. 355, 373 (1932) (referring to law-making power of the state as including the power of gubernatorial veto); *Kilbourn*, 103 U.S. at 191 ("To these general propositions [regarding the separation of powers] there are in the Constitution of the United States some exceptions. One of these is that the President is so far *made a part of the legislative power*, that his assent is required to the enactment of all statutes and resolutions of Congress." (emphasis added)). As recognized by the Fifth Circuit in *Hernandez v. City of Lafayette*,

> The mayor's veto, like the veto of the President or a state governor, is undeniably a part of the legislative process. It differs only that it takes place at the local level. When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise of legislative decision making as is the vote of a member of Congress, a state legislator, or a city councilman.

Hernandez, 643 F.2d at 1194; *accord Orange*, 830 F. Supp. at 706. Thus, Bogan is absolutely immune from suit in connection with his proposal of the Ordinance as well as his act of signing the Ordinance into law.

The challenged actions of Councillor Roderick also entitle her to absolute legislative immunity. During the budget preparation for Fiscal Year 1992, Councillor Roderick was Chairperson of the Ordinance Committee. *Pet. App.* at 7-8. In conjunction with the budget proposal, the Ordinance eliminating DHHS was submitted to the City Council and subsequently referred to the Ordinance Committee. *Id.* Councillor Roderick considered the Ordinance, along with other councillors, in committee and, by vote, presented the Ordinance to the full city council for consideration. *Id.* Councillor Roderick then cast a vote for the passage of the position-elimination ordinance, along with five other city councillors. *Id.* at 8. The Ordinance was thereby approved by the City Council in a six-to-two vote. *Id.* As such, regardless of whether Councillor Roderick voted against the Ordinance, or in favor of it, the Ordinance would have passed.

There can be no doubt that these actions are traditionally legislative functions. *See, e.g., Powell*, 395 U.S. at 502; *Kilbourn*, 103 U.S. at 204; *Chappell v. Robbins*, 73 F.3d 918, 921 (9th Cir. 1996) (state senator absolutely immune in civil RICO action for pushing for passage of legislation); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995) (legislator's vote constitutes act of legislating and cloaks him or her with immunity if vote is cast for or against legislation); *Hernandez*, 643 F.2d at 1194.[15] In *Coffin v. Coffin*, the Supreme Judicial Court of Massachusetts specifically included "the giving of a vote" as a representative function protected by legislative immunity. 4 Mass. at 27; *accord Smith*, 45 F.3d at 405; *Hernandez*, 643 F.2d at 1194.

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[15] The vote of the City Council was necessary because the City established DHHS by ordinance enacted by the City Council, and therefore, it could only be eliminated by ordinance. *See supra*, pp. 3-5.

III. INDIVIDUAL MUNICIPAL OFFICIALS CANNOT BE THE PROXIMATE CAUSE OF ACTIONABLE INJURY WHERE THE OFFICIAL MUNICIPAL DECISIONMAKER LAWFULLY ENACTED A VALID MUNICIPAL BUDGETARY ORDINANCE.[16]

In a departure from established principles of traditional tort law, the First Circuit held that while the official decision making body lawfully enacted facially benign legislation, individual legislators could be found to be the proximate cause of the plaintiff's injury pursuant to § 1983, based *only* on their improper motivation. *See J.A.* at 69. The First Circuit's approach opens the door for courts to impose liability on individual legislators despite the existence of a superseding cause, *i.e.*, the enactment of facially neutral legislation by the official decision maker absent any impermissible purpose or infusion of the individuals' allegedly improper motivations in the deliberative and collective decision making process. To sanction such an approach would impermissibly permit courts to hinder the enactment of proper, necessary, and fiscally sound legislation.

A. The First Circuit's Approach Is Contrary To The Law Of Proximate Causation.

As demonstrated by case law involving somewhat analogous § 1983 claims, the First Circuit's holding cannot stand. Specifically, these cases reflect a recognition, either explicit or implicit, that individual defendants may be liable under § 1983 *only* if: (a) the action challenged by the plaintiff was improper and (b) the individual defendants played a significant role in shaping or orchestrating the improper action. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) (bail

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[16] Should this Court conclude that Mr. Bogan and Ms. Roderick are entitled to absolute legislative immunity for their participation in the enactment of the position-elimination ordinance, the Court need not decide this last issue.

decision was improper because, absent the defendant police officer's misrepresentations, there was no basis for the bail; the defendant police officer "was in all probability the cause of the ruling" made by the clerk who set bail); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987) (summary judgment for individual defendants was deemed improper because, absent misconduct of the individual defendants, there was no basis for the termination decision and plaintiff's entire claim was that his termination was caused by the investigation); *Arnold v. International Business Machines, Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981) (if plaintiff could have pointed to evidence showing that individual defendants had some control or power over state actor, and had directed it to take certain action, there would have been a dispute of material fact on issue of proximate causation under § 1983); *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (two inmates were improperly transferred to segregated confinement because the defendant correctional officers submitted false reports and recommendations concerning them and confinement orders were specifically based upon the false reports), *cert. denied*, 444 U.S. 1035 (1980). In all of these cases, the evidence demonstrated that the ultimate decisionmakers were mere conduits of the defendants' unlawful motivations because they directly relied upon the individual defendants' improper information. Under these circumstances, a finding that the Individual Defendants' actions were the proximate cause of the plaintiffs' injuries was found proper.

In the present case, the wrong alleged by Scott-Harris was the elimination of her position through passage of the Ordinance. The ultimate decisionmaker with respect to the position-elimination ordinance was the City (defined as the Mayor and a majority of the City Council). Even assuming improper animus on the part of Bogan and Roderick, they could have been found to be the proximate cause of the position elimination *only if*: (a) the decision itself was unlawful, in that a majority of the City Councillors shared their improper animus; or (b) they "hoodwinked" a majority of the City Councillors into believing that the position should be

eliminated for budgetary reasons which, unbeknownst to the Councillors, were pretextual.

With respect to the first scenario, the First Circuit found that the enactment of the Ordinance itself was not unlawful in that a majority of the City Councillors did not share the alleged improper animus of Bogan and Roderick. *See Pet. App.* at 61. With respect to the second scenario, Scott-Harris chose not to present *any evidence* that Bogan or Roderick *had* attempted to "hoodwink" or "fool" a majority of the City Councillors in this fashion. *See id. App.* at 60-61. There was *no* evidence introduced that either of the individual defendants made any ongoing or improper efforts to induce other Councillors to act for illicit or impermissible reasons. *Id.* at 61.

If there was any evidence that Bogan and Roderick had attempted to "hoodwink" the Councillors, it would have been proper for the jury to determine whether this formed the basis for the City's decision. It would have been entirely possible and permissible for the jury to find that Bogan and Roderick's efforts were unpersuasive, and that a majority of the Councillors voted to eliminate Scott-Harris' position solely for budgetary reasons. In that event, the position-elimination decision would not have been improper, and Scott-Harris would have suffered no actionable injury.

Wagenmann v. Adams illustrates this point. The court in *Wagenmann* held that the jury properly found that the setting of bail at $500 was excessive and that the defendant police officer was the proximate cause of the violation of plaintiff's right to be free from excessive bail. *Wagenmann*, 829 F.2d at 211-213. The defendant admitted to contacting the court clerk to set plaintiff's bail. *Id.* at 212. In doing so, the police officer recounted his version of the facts as well as his description of the charges. *Id.* He also characterized the plaintiff's access to a cash sum certain, which the court concluded "contributed materially to what eventuated with respect to bail." *Id.* The police officer was the court clerk's sole source of information about the arrest and the clerk exclusively relied on the facts and recommendation provided by the police officer in setting the plaintiff's bail. *Id.* As the court observed, the police

officer "did not merely arrest Wagenmann and then step aside, letting an independent judicial officer set bail. [He] did appreciably more, helping to shape, and exercising significant influence over, the bail decision." *Id.* If the defendant in that case had made the same misrepresentations, but the clerk had an independent basis upon which to set bail (*e.g.*, an independent report that the plaintiff had handguns in the hotel room), setting of the bail would not have been improper and the police officer could not have been the proximate cause of the injury. *See id.* at 212-213.

In the present case, therefore, the independent action of the official decisionmaker to enact a facially benign ordinance for proper reasons, must be a superseding cause severing the causal connection between the individual legislators' allegedly improper animus and Scott-Harris' alleged injury. There was no evidence that either Bogan or Roderick helped shape or exercised any influence over the other City Councillors' decision to vote in favor of the position-elimination ordinance. Moreover, there was no evidence that the action of the Ordinance Committee or the City Council were mere formalities. Under such circumstances, where the causal connection between the defendants' actions and the alleged constitutional deprivation is severed, there is no basis for imposing liability on individual legislators.

B. The First Circuit's Approach To Proximate Causation Compensates Those Who Have Suffered No Actionable Injury.

Absent evidence that the City Councillors voted to eliminate Scott-Harris' position either for constitutionally impermissible reasons or because they were "hoodwinked" by Bogan and Roderick into doing so, there is *no* record evidence that the position-elimination decision itself was improper. *See Pet. App.* at 60-63. More specifically, there is no evidence to support a finding that a majority of the City Councillors took action based upon any factors other than legitimate economic ones. *See id.* at 61. As a matter of law, therefore, neither Bogan nor Roderick could have been the *proximate* cause of

any *actionable* injury to Scott-Harris under these circumstances. *Cf. Douglas v. City of Jeanette, et al.*, 319 U.S. 157, 165 (1942) (*dicta*) ("If the ordinance had been held constitutional, petitioners could not complain of penalties which would have been but the consequences of their violation of a valid state law.")

The district court sought to avoid this anomalous result in its formulation of the special verdict form. *See J.A.* at 137-141. As outlined in the special verdict form and as articulated by the court in the jury charge, if the jurors found that the Ordinance was not only facially benign, but also that the City enacted the Ordinance for nondiscriminatory or nonretaliatory reasons, they were to go no further. *See id.* at 137-141, 200-201, 213. In other words, if the Ordinance was lawfully enacted by the City, the individuals involved in the collaborative and deliberative legislative process could not, as a matter of law, proximately cause any actionable injury.

The district court's approach was consistent with the requirements of § 1983. In particular, § 1983 holds liable those cloaked in the authority of state law who subject or cause to be subjected any person to the deprivation of certain enumerated rights. *See* 42 U.S.C. § 1983. The enactment of legislation necessarily requires the collective action of the legislative body. No individual legislator, on his or her own, can enact legislation, but rather, is dependent upon the action and will of other legislators. Thus, the single vote of a legislator or the mere introduction of proposed legislation cannot, by themselves, subject someone or cause someone to be subjected to a deprivation of their rights. Any alleged constitutional deprivation in the legislative context can only occur when the legislation has survived the deliberative and collaborative process to be enacted into law. To permit a plaintiff to pick out legislators based on their single vote and ascribe improper motivations to them for that vote as a basis for liability pursuant to § 1983, without more, circumvents, rather than establishes, the causal link between the challenged action, *i.e.*, the enactment of legislation, and the alleged injury, *i.e.*, the impermissible deprivation of rights.

Section 1983 was not designed to provide remedies to individuals adversely impacted by lawful legislation merely on the basis that one or two of the legislators involved in the legislative process secretly supported the legislators because of their improper animus towards those individuals. Contrary to the First Circuit's conclusion, therefore, Bogan and Roderick could not have caused any deprivation of Scott-Harris' rights merely by their participation in the enactment of lawful legislation even if they secretly harbored an improper animus towards her.

C. The First Circuit's Approach To Proximate Causation Would Hinder the Enactment Of Lawful And Proper Legislation.

The First Circuit's approach impermissibly permits courts to hinder the enactment of proper, necessary, and fiscally sound legislation. Absent a finding that a challenged municipal action is in fact improper, individual legislators and officials involved in the legislation could be held liable for their role in the enactment of perfectly legal and proper legislation. This would be particularly troubling in the context of the instant case, where the challenged legislation has been found to be not only *facially* benign, but was enacted for a benign *reason* as well. The result of a contrary rule would be to invite litigation, regardless of whether the challenged legislation was lawful, and regardless of whether it was enacted for lawful reasons. In such cases, one would pursue an action against as many individual legislators as one could, arguing that if any one of them had a "bad" motive and participated *in any way* in the legislative process (regardless of whether they attempted to persuade others of their views), their participation could be a "proximate" cause of the challenged legislation – again, without regard to how lawful the legislation itself might be.

At bottom, Bogan and Roderick respectfully submit that the First Circuit erred because it failed to recognize the impact of its holding that the City had acted lawfully in

enacting the ordinance which eliminated Scott-Harris' position. The court proceeded to apply a traditional proximate cause tort analysis to determine that the Individual Defendants were the "legal cause" of harm to Scott-Harris, without pausing to consider whether, if the City had passed a lawful ordinance by lawful means, she had suffered any ultimate legal harm.[17] The answer to this forgotten question must be, as a matter of law, that she had not.

CONCLUSION

For the foregoing reasons, the Petitioners Daniel E. Bogan and Marilyn Roderick respectfully request that this Court hold (1) that municipal and local officials are entitled to absolute immunity for actions taken in their legislative capacities; (2) that the First Circuit erred in its formulation and application of the standard of absolute immunity; and (3) that the First Circuit erred in holding that Mr. Bogan and Ms. Roderick proximately caused Scott-Harris injury when the official decision maker enacted lawful legislation for lawful reasons. Mr. Bogan and Ms. Roderick respectfully request that the Court reverse the decision of the Court of Appeals of the First Circuit and the decision of the district court below,

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[17] The district court, in contrast, clearly recognized the importance of a finding against the City as a necessary predicate to a finding of liability against the Individual Defendants. The district court specifically instructed the jurors that if they were to find the City not liable, then they were to go no further with their deliberations. *J.A.* at 200-201, 213; *see also id.* at 137-141. It is for this reason that the Individual Defendants did not object to the district court's subsequent instructions on causation, to the effect that the jurors were to consider causation only if they first found that the City was liable and, therefore, that Scott-Harris had suffered a legally actionable injury arising out of the legislative process.

and remand this matter to the district court for entry of judgment of dismissal.

Dated: August 14, 1997

Respectfully submitted,

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APPENDIX A

Massachusetts Gen. L. Ann. ch. 44, § 32

Within one hundred and twenty days after the annual organization of the city government in any city other than Boston, the mayor shall submit to the city council the annual budget which shall be a statement of the amounts recommended by him for proposed expenditures of the city for the next fiscal year. The annual budget shall be classified and designated so as to show separately with respect to each officer, department or undertaking for which an appropriation is recommended:

(1) Ordinary maintenance, which shall also include debt and interest charges matured and maturing during the next fiscal year, and shall be subdivided as follows:

(a) Salaries and wages of officers, officials and employees other than laborers or persons performing the duties of laborers; and

(b) Ordinary maintenance not included under (a); and

(2) Proposed expenditures for other than ordinary maintenance, including additional equipment the estimated cost of which exceeds one thousand dollars.

The foregoing shall not prevent any city, upon recommendation of the mayor and with the approval of the council, from adopting additional classifications and designations.

The city council may by majority vote make appropriations for the purposes recommended and may reduce or reject any amount recommended in the annual budget. It shall not increase any amount in or the total of the annual

budget nor add thereto any amount for a purpose not included therein except on recommendation of the mayor, and except as provided in section thirty-three; provided, however, that in the case of the school budget or in the case of a regional school district assessment, the city council, on the recommendation of the school committee or on recommendation of a regional district school committee, may be a two-thirds vote increase the total amount appropriated for the support of the schools or the regional district schools over that requested by the mayor; and provided, further, that no such increase shall be voted if it would render the total annual budget in excess of the property tax limitations set forth in section twenty-one C of chapter fifty-nine. Except as otherwise permitted by law, all amounts appropriated by the city council, as provided in this section, shall be for the purpose specified. In setting up an appropriation order or orders based on the annual budget, the council shall use, so far as possible, the same classifications required for the annual budget. If the council fails to take action with respect to any amount recommended in the annual budget, either by approving, reducing or rejecting the same, within forty-five days after the receipt of the budget, such amount shall without any action by the council become a part of the appropriations for the year, and be available for the purposes specified.

If, upon the expiration of one hundred and twenty days after the annual organization of the city government, the mayor shall not have submitted to the city council the annual budget for said year, the city council shall within thirty days upon its own initiative prepare the annual

budget, and such preparation shall be subject to the same requirements as the mayor's annual budget, so far as apt.

Within fifteen days after such preparation of the annual budget, the city council shall proceed to act by voting thereon and all amounts so voted shall thereupon be valid appropriations for the purposes stated therein to the same extent as though based upon a mayor's annual budget, but subject, however, to such requirements, if any, as may be imposed by law.

If the council fails to take action with respect to any amount recommended in the budget, either by approving, reducing or rejecting the same, within fifteen days after such preparation, such amount shall, without further action by the council, become a part of the appropriations for the year, and be available for the purposes specified.

Nothing in this section shall prevent the city council, acting upon the written recommendation of the mayor, from voting appropriations, not in excess of the amount so recommended, either prior or subsequent to the passage of the annual budget.

The provisions of this section shall apply, in any city adopting the Plan E form of government under chapter forty-three, only to the extent provided by section one hundred and four of said chapter.

Neither the annual budget nor appropriation orders based thereon shall be in such detail as to fix specific salaries of employees under the direction of boards elected by the people, other than the city council.

The city council may, and upon written request of at least ten registered voters shall, give notice of a public hearing to be held on the annual budget, prior to final action thereon, but not less than seven days after publication of such notice, in a newspaper having general circulation in the city. At the time and place so advertised, or at any time or place to which such public hearing may from time to time be adjourned, the city council shall hold a public hearing on the annual budget as submitted by the mayor, at which all interested persons shall be given an opportunity to be heard for or against the proposed expenditures or any item thereof.